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No. _____

In the Supreme Court of the United States

C. SCOTT JOHNSON, DIRECTOR, DEPARTMENT OF ADMINISTRATIVE SERVICES; REGINALD WILKINSON, DIRECTOR OF REHABILITATION AND CORRECTION,
Petitioners,

v.

ASSOCIATED GENERAL CONTRACTORS OF OHIO, INC.; ASSOCIATED GENERAL CONTRACTORS OF NORTHWEST OHIO, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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22 pp

QUESTION PRESENTED

When a party seeks to overturn a prior decision on the ground that its factual predicate is invalid, does *stare decisis* require that party to bear the burden of producing evidence on the relevant factual issues?

PARTIES

Petitioners are: C. Scott Johnson, Director of the Ohio Department of Administrative Services, and Reginald Wilkinson, Director of the Ohio Department of Rehabilitation and Correction.

Respondents are: the Associated General Contractors of Ohio, Inc., and the Associated General Contractors of Northwest Ohio, Inc.

The following entities participated as *amici curiae*: the Ohio Minority Contractors Association, Inc., the National Association for the Advancement of Colored People, Cleveland Chapter, and the Ohio Association of Businesses that are African-American Owned.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of the Director of the Ohio Department of Administrative Services and the Director of the Ohio Department of Rehabilitation and Correction, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 214 F.3d 730. The order of the district court appealed from (App. 92a-94a) is unreported. The subsequent opinion of the district court denying a stay (App. 19a-91a) is reported at 50 F.Supp.2d 741.

JURISDICTION

The court of appeals issued the judgment on June 1, 2000, and denied rehearing on August 24, 2000. This Court granted an extension of time for filing this petition through December 22, 2000 (00A442). This Court's jurisdiction is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Fourteenth Amendment, Section 1, of the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

2. Ohio Revised Code sections 122.71, in pertinent part, and 123.151, in its entirety, are set forth in the Appendix. App. 110a-111a; App. 112a-120a.

INTRODUCTION

In 1980, against a backdrop of a history of racial discrimination in the awarding of state contracts, the Ohio General Assembly enacted a scheme of laws designed to create a level playing field for contractors doing business with the State of Ohio by ensuring the participation of minority-owned businesses. App. 2a-3a. In 1983, the Sixth Circuit upheld those laws as constitutional. *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983). And in 1989, in the landmark decision concerning the use of racial classifications to remedy discrimination in state contracting, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 502, 503-04 (1989), this Court cited the Ohio program with approval.

In 1998, an association of contractors challenged the construction contracting portion of the program, charging violations of equal protection. Despite the Sixth Circuit's prior decision upholding the program, the district court placed upon the State the burden of producing evidence that the program is constitutional. On appeal, the Sixth Circuit affirmed that burden, thus raising the question of the proper allocation of the burden of production when a party seeks to overturn a prior court decision.

As presented below, in light of the Sixth Circuit's prior decision upholding the underlying statutory scheme, as well as fundamental principles of *stare decisis*, the challenging party (Respondents here), and not the State, should have borne the burden of producing evidence that the law was no longer supported by a compelling state interest and, therefore, that the prior decision was no longer valid. Because Respondents failed to meet that burden, the court of appeals should have reversed the decision of the district court and upheld the constitutionality of the program.

STATEMENT OF THE CASE

1. The Ohio Program. Ohio's program for minority participation in construction contracting operates in a straightforward manner. Ohio Revised Code (R.C.) section 123.151 generally requires state agencies to set aside for bidding by Minority Business Enterprises (MBEs) five percent of the total value of construction contracts awarded in each fiscal year. R.C. 123.151; App. 112a-120a. Non-minority businesses may bid on contracts identified for minority participation if they are willing to share the profits with a minority firm through partnership or joint venture agreements. R.C. 122.71(E)(1), (2); App. 110a.

Ohio law defines an MBE as "an individual, partnership, corporation, or joint venture of any kind that is owned and controlled by United States citizens, residents of Ohio, who are members of one of the following economically disadvantaged groups: Blacks, American Indians, Hispanics, and Orientals." R.C. 122.71(E)(1); App. 110a. There are specific procedures for certification and listing as an MBE. R.C. 123.151(B); App. 112a-113a.

2. The District Court Proceedings. Enacted in 1980 and upheld in 1983, Ohio's program continued uninterrupted until 1998, when Respondents, the Associated General Contractors of Ohio, Inc., and the Associated General Contractors of Northwest Ohio, Inc. (the Contractors), challenged the MBE program for construction contracting in the district court. The challenge arose when the State set aside for bid by MBEs the contract for a portion of a new prison facility, and ultimately awarded the contract to an MBE. The Contractors alleged that the State's set-aside of the contract, as well as the underlying statute, violated the equal protection guarantee of the Fourteenth Amendment, and they sought declaratory and injunctive relief.

At the start of a preliminary injunction hearing, the district court ordered consolidation with a permanent injunction hearing. During the two-day proceeding, the State presented all of the evidence that was before the Ohio General Assembly when it enacted the law underlying the program in 1980, as well as the compliance reports prepared by state agencies since the law's enactment. The Contractors argued that the latter evidence showed that the State had overutilized minority-owned firms and that the State had failed to conduct a disparity study or otherwise maintain records demonstrating that the MBE program for construction contracting was still justified. The Contractors presented

no evidence to demonstrate the lack of a disparity between minority and non-minority contractors, nor any other evidence sufficient to show affirmatively that the MBE program for construction contracting is not justified.

The State also submitted documents and witness testimony regarding additional evidence that could be prepared if more time were given and, at the end of the hearing, asked for additional time (a six-month trial schedule) to present additional evidence. The court refused.

Following this two-day, consolidated evidentiary hearing, the district court issued an oral bench ruling that, notwithstanding the Sixth Circuit's decision in *Keip*, the laws supporting the MBE program for construction contracting were unconstitutional, and enjoined that program. App. 104a. In its bench ruling, the district court stated that "[t]he party defending the plan bears the burden of producing evidence that the plan is constitutional, while the party challenging the plan retains the ultimate burden of proving its unconstitutionality." App. 97a. The State, the court found, had failed to meet that burden.

3. The Ohio Supreme Court Decision in *Ritchey Produce*. While the appeal in this case was pending, the Ohio Supreme Court decided *Ritchey Produce Co., Inc. v. Ohio Dep't of Admin. Svcs.*, 85 Ohio St.3d 194 (1999). That decision upheld Ohio's MBE program for goods and services contracting. The goods and services program was part of the same 1980 legislative enactment as the construction contracting program at issue here, and it applies the same statutory definition for a qualified minority participant. The Ohio Supreme Court concluded that the State of Ohio had carried its burden by producing the requisite "firm basis in evidence" to support the program, citing judicial,

executive, and administrative findings that detailed the State's participation in past discriminatory practices in the awarding of state contracts—evidence, the court stated, that the Ohio legislature had relied on in enacting the MBE program. *Id.* at 262-63.

The Ohio Supreme Court also concluded that the program is narrowly tailored, specifically holding that the program was preceded by unsuccessful, race-neutral attempts to eliminate discrimination; that it is flexible; and that the goals of the program have a direct relationship to the actual contracting market. *Id.* at 265-70.

The Ohio Supreme Court distinguished the facts of the *Ritchey Produce* case from the facts of this case, which was then pending before the Sixth Circuit. The Supreme Court limited its holding "to the area of state procurement contracting." *Id.* at 274.

4. The District Court Ruling on the State's Motion to Stay. After the *Ritchey Produce* decision, the State moved the district court for a stay of its order pending appeal. App. 21a. The district court issued a lengthy decision outlining its reasons for disagreeing with the Ohio Supreme Court and declined to stay its ruling in this case. App. 19a-91a.

5. The Court of Appeals Decision. The State appealed to the Sixth Circuit, which ultimately upheld the district court's review of Ohio's MBE program for construction contracting. In doing so, the Sixth Circuit not only acknowledged the conflict with its prior decision in *Keip*, but also opined that, in its view, its opinion was "not reconcilable with" *Ritchey Produce*. App. 3a, 17a. The court, also holding that the State bore the burden of production, concluded that the MBE program for construction contracting failed under *Croson* and strict

scrutiny analysis. App. 5a-13a. The court criticized the evidence in the *Keip* case and held that the State had failed to show either a compelling interest or narrow tailoring. *Id.* The court affirmed the district court's decision not to give the State a six-month continuance to gather the evidence it wished to present, concluding that the district court had had sufficient evidence, that the State should have gathered the proper evidence when the law was enacted rather than all these years later, and that Ohio had not kept the kinds of records and statistics necessary to support the program's continuation. App. 13a-15a. On this reasoning, the court of appeals affirmed the decision of the district court.

REASONS FOR GRANTING THE PETITION

This Court should settle the conflict among circuits regarding the proper allocation of evidentiary burdens when a party challenges a previous court decision.

1. The fundamentals of *stare decisis*. "[T]he doctrine of stare decisis is of fundamental importance to the rule of law." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991) (citations omitted). Following precedent "promotes stability, predictability, and respect for judicial authority," *id.*, and results in orderly, evenhanded, and consistent application of legal rules. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980). Accordingly, only "some 'special justification'" will support a departure from precedent. *Dickerson v. U.S.*, 120 S.Ct. 2326, 2336 (2000) (citations omitted).

These fundamental principles must, and should, apply to precedent concerning constitutional questions and, therefore, must affect the allocation of evidentiary burdens in such cases. Undoubtedly, a party challenging

the constitutionality of a statute always has the burden of persuasion. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (plurality). Burdens of production may differ in constitutional cases, however, depending on the applicable standard of review.

For instance, rational basis review places the *entire burden of production* on the party challenging the constitutionality of a statute. *See Heller v. Doe*, 509 U.S. 312, 320 (1993). Strict scrutiny review, however, splits the burden of production between the parties. First, the challenger must show that the statute is subject to strict scrutiny by showing, for example, that it involves a racial classification. *See Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *Croson*, 488 U.S. at 505, 508. Then the burden of production shifts to the government to introduce evidence that the statute meets a compelling government interest. *See id.* at 505; *Wygant*, 476 U.S. at 292-93. Finally, the challenger bears the ultimate burden of persuading the court that the law is unconstitutional. *See id.*

Unquestionably, racial classifications are at issue here and, accordingly, strict scrutiny applies. *Adarand*, 515 U.S. 200; *Croson*, 488 U.S. 469. Thus, had the first challenge to Ohio's program occurred after this Court decided *Croson*, strict scrutiny would have obligated the State to produce a "strong basis in evidence" to support a compelling state interest. *See id.* at 500.

But the first challenge to the Ohio program occurred seven years before *Croson*, so this was *not* a first-time challenge. *See Ohio Contractors Ass'n v. Keip*, *supra*. The challengers in this case sought not only to invalidate a longstanding statutory scheme, but also to overturn longstanding circuit precedent validating that scheme on the same grounds—a situation that this Court's

MBE precedent has not addressed, but surely one to which *stare decisis* must still apply.

Basic principles of *stare decisis* require an objecting party to make an unusually strong showing as to why a court should invalidate a prior decision. Indeed, "every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by stare decisis yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). And "only the most convincing justification" will suffice "to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance." *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992). Absent such a showing, the overruling of precedent comes "at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law." *Id.* at 869.

Consistent with these basic principles, several federal courts of appeals have expressly required a party seeking to overturn a court's prior decision to bear the burden of producing the evidence necessary to convince the court that its earlier decision cannot stand. For example, in *EEOC v. Trabucco*, 791 F.2d 1 (1st Cir. 1986), the First Circuit placed upon the challenger the burden of showing that the factual predicate on which the court had based a prior age-discrimination decision had not been developed adequately to render that decision controlling in future cases on the same issue. The court did so even though the burden of production had properly shifted to the defendant in the earlier case. *See also United States v. 177.51 Acres of Land*, 716 F.2d 78, 81 (1st Cir. 1983) (invoking, in condemnation case, principle that a party challenging validity of a prior court decision "has the

burden of presenting 'persuasive new evidence' of invalidity and demonstrating that there is a 'material distinction' between the cases") (quoting *Illinois Tool Works, Inc. v. Foster Grant Co., Inc.*, 547 F.2d 1300, 1302 (7th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977) (invoking same principle in context of challenge to court's earlier determination that patent was valid)); *Gavin v. Chernoff*, 546 F.2d 457, 458-59 (1st Cir. 1976) (concluding that challenger, having presented neither compelling new reasons nor changes in circumstances sufficient to justify overturning prior *habeas corpus* decision, had not carried its burden); *R.J. Saunders & Co., Inc. v. U.S.*, 54 C.C.P.A. 29 (1966) (holding that challenger in customs case had not presented new factual evidence sufficient to convince the court to overturn prior decision on same issue); *United States ex rel. Townsend v. Twomey*, 452 F.2d 350, 355 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972) (holding that *habeas corpus* applicant had failed to carry burden by failing to produce new legal or factual evidence sufficient to invalidate prior decision on same issue).

Thus, *stare decisis* requires anyone challenging a statutory scheme after the very same challenge has already failed on the merits to carry the burden of production of the evidence at trial, even in a case that would have required strict scrutiny burden shifting had it been a first-time challenge. This requirement makes sense because it respects the principles of finality and consistency in the law and appropriately conserves public resources. The need for finality and consistency, as embodied in the doctrines of *res judicata* and collateral estoppel, for example, as well as in statutes of limitations, is no less important in a case that, although it involves different parties, is in the same court and concerns the very same subject and the very same legal and factual issues as did an earlier case. Thus, consistent with *stare decisis*; the State should not be at risk of having to duplicate such an expenditure of resources at the whim of

successive plaintiffs who, despite the prior court decision, decide to sue anyway.

2. The need for a new rule. When the Contractors filed this case in the district court, the Sixth Circuit had already concluded that Ohio's General Assembly properly enacted the MBE program for construction contracting in 1980. *See Keip, supra.* Once a court has made such a final judicial determination, something must prevent the State from repeatedly being haled into court and made to produce and update, again and again, its evidence (likely to be detailed, complex, and voluminous) of the validity of the program. If that were permissible, challengers thinking themselves aggrieved by the program could repeatedly file lawsuits attacking the program and could then force the State and the courts to endure multiple trials of an issue that has already been decided.

Non-strict-scrutiny cases avoid this problem by placing the entire burden of production on the challenging party. But the burden-shifting procedure in strict scrutiny cases leaves the government much more vulnerable to duplicative lawsuits unless a rule is formulated to ensure that the government need not carry its burden more than once in litigation of the same issue.

The record in this case illustrates the need for such a rule, as well as the conundrum for a State presented with this situation. In this case, the district court imposed upon the State the entire burden of production, which, according to the Sixth Circuit, the State could meet only with specificity and explicit findings. App. 6a-7a. Yet, the district court required the State to carry that heavy burden without the benefit of a normal trial schedule. Instead, the State apparently should have stood ready for fifteen years, prepared to defend at any time and in any forum, with just seven

days' notice, its MBE programs. *See* App. 14a (" . . . the time of a challenge to the statute, at trial, is not the time for the state to undertake factfinding").

So, despite a prior decision by the Sixth Circuit that the program is valid, the court required the State to carry the burden of production. Despite the passage of time since the program's inception, the court required the State to meet that burden with new evidence. And despite the need for new evidence, the court refused to grant the State a normal trial schedule. Surely the law entitled the State, when defending the constitutionality of a statute previously upheld, to more. Indeed, basic principles of *stare decisis* entitle the State to the same allocation of evidentiary burdens that courts, as shown above, apply in other cases.

The Contractors in this case failed to make a showing that would support overturning the Sixth Circuit's prior decision, and therefore failed to carry their burden. They presented no evidence to demonstrate the lack of a disparity between minority and non-minority contractors, nor any other evidence sufficient to show affirmatively that the MBE program for construction contracting is not justified.

For these reasons, the court of appeals should have reversed the district court's decision and upheld the challenged program as constitutional. But the Sixth Circuit, ignoring long-established principles of *stare decisis*, and despite arguments in the briefs concerning the *stare decisis* effect of *Keip* on the evidentiary burdens in this case, erroneously confirmed that the burden of producing factual evidence in this second equal protection challenge again belonged to the State. The Sixth Circuit thereby placed itself in conflict with other circuit courts on the issue of the proper allocation of the burden of production when a prior decision by a court is challenged.

3. The impact of the Ohio Supreme Court's decision. While this challenge to the State's MBE program for construction contracting was pending before the Sixth Circuit, the Ohio Supreme Court decided a case presenting a parallel constitutional question regarding the State's MBE program for goods and services contracting. In *Ritchey Produce, supra*, the Ohio Supreme Court, applying strict scrutiny, unanimously upheld the MBE program for goods and services as constitutional.

Ritchey Produce, supra, stands as a comprehensive decision upholding a program that was part of the same 1980 enabling legislation at issue here and that applies the same statutory classifications. The Ohio Supreme Court concluded, consistent with the conclusions of the Sixth Circuit in 1983 and this Court's observation in *Croson*, "that the General Assembly had a 'strong basis in evidence' for finding that remedial action was necessary to ameliorate the effects of identified racial discrimination in which the state itself had either actively or passively participated." *Ritchey Produce*, 85 Ohio St.3d at 260; *see also Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

Acknowledging the district court's decision in this case, the Ohio Supreme Court in *Ritchey* distinguished the cases. As the Ohio Supreme Court noted, the district court's order dealt only with state construction contracts and subcontracts. In contrast, the *Ritchey* case dealt "with the denial of an application for MBE recertification of a business that was formerly certified to bid on state purchasing contracts for goods and services, *i.e.*, contracts set aside under R.C. 125.081(A)—not R.C. 123.151." *Id.* at 274. Having made this distinction, the Ohio court stated, "We specifically wish to avoid a direct conflict between the case at bar and [the federal case, *Drabik*]. Thus, we limit our holding today to the area of state procurement contracting. We do so in the interests of

state and federal judicial comity and because the facts of the case at bar are amenable to a limited holding." *Id.*

The Sixth Circuit disagreed, however. The court of appeals found that its opinion "is not reconcilable with *Ritchey*, despite the Ohio Supreme Court's attempt to distinguish the cases." App. 17a-18a.

The State agrees with the Ohio Supreme Court that the cases are factually distinguishable, but recognizes that the cases are nonetheless inconsistent as to the constitutionality of the statutory classifications underlying both MBE programs. That inconsistency, however, is not before the Court and does not change the question presented. Indeed, both the Ohio Supreme Court and the Sixth Circuit imposed the burden of production on the State and, therefore, failed to account adequately for *Keip* and the *stare decisis* effect of that decision.

4. The need for careful review. Finally, this Court has cautioned that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant*, 476 U.S. at 273-74, citing *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.). The State agrees. Indeed, "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 501.

But even in its efforts "to 'smoke out' illegitimate uses of race," *id.* at 493, a court may not ignore the possibility that a State has identified and addressed the vestiges of racial discrimination, all within constitutional parameters, *and that a prior court properly held so.* Nor may a court ignore the burdens that an objecting party must ordinarily and necessarily meet to show how or why

the passage of time has caused that prior decision to become invalid. A court may not presuppose that a State can never satisfy strict scrutiny in defense of a state statute, especially where that statute has survived a previous challenge. Such presupposition conflicts with this Court's admonition against concluding too quickly that a government's attempts to address the persistent practice and lingering effects of racial discrimination are unlawful, *Adarand Constructors, Inc. v. Pena,* 515 U.S. at 237, and conflicts with fundamental principles of *stare decisis*.

CONCLUSION

For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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